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Federal Communications Commission
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WASHINGTON, D. C.

In the Matter of)
)
Implementation of Sections 11)
and 13 of the Cable Television) MM Docket No. 92-264
Consumer Protection and)
Competition Act of 1992)
)
Horizontal and Vertical Ownership)
Limits, Cross-Ownership Limitations)
and Anti-trafficking Provisions)

REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI") hereby files its Reply Comments in the above-captioned proceeding.¹ Pursuant to the Commission's Order adopted February 26, 1993,² TCI will confine its comments herein to the issue of antitrafficking. TCI will submit reply comments on the issues of subscriber and channel occupancy limits consistent with the new deadline established in the Commission's Order.

I. ANTITRAFFICKING

With the exception of predictably hostile and unsupported comments submitted by traditional adversaries of the

¹ Notice of Proposed Rulemaking and Notice of Inquiry in MM Docket No. 92-264, FCC 92-542 (rel. Dec. 28, 1992) ("Notice").

² See Order in MM Docket No. 92-264, DA 93-233 (rel. Feb. 26, 1993).

cable television industry,³ the comments in this proceeding regarding antitrafficking reflect an appropriate recognition of the harm to the cable industry and its customers that will occur if the antitrafficking rule is not limited to the particular evils to which it is addressed. Therefore, only three main points warrant mention in these Reply Comments.

First, there is a great deal of confusion in the comments as to just what kind of "transfer" is at issue in Section 13. TCI submits that the statutory language itself makes plain that Section 13 applies only to transfers of ownership -- equity interests -- in cable television systems. Issues such as management control and the byzantine precedents on "de facto control" developed under Section 309(c)(2)(B) of the Communications Act are totally irrelevant to the application of Section 13, which is concerned exclusively with preventing profiteering through short term resale of cable television systems.

Second, TCI believes that the comments underscore the importance of vesting interpretation and enforcement of Section 13 exclusively in the Commission.

Third, the comments regarding the interpretation and scope of the exception for tax-free transactions in Section 13(c)(1) illustrate the importance of adopting general rules that

³ See, e.g., Comments of the National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties ("NATOA").

give full effect to the section rather than trying to limit the exception to a list of particular kinds of transactions. Each of these points is set out more fully below.

A. The Antitrafficking Restriction is Addressed Solely to Ownership, Not Control

With certain exceptions discussed below, there appears to be widespread agreement that the standards developed to distinguish "substantial" transfers of ownership under Section 309(c)(2)(B) of the Communications Act from "pro forma" transfers of ownership should be relied upon to limit the transactions subject to the anti-profiteering restriction of Section 13 of the Act. However, numerous commenters seem to have overlooked the crucial difference in statutory language between Section 13 and Section 309(c)(2)(B): Section 13 applies exclusively to a transfer of ownership, whereas Section 309(c)(2)(B) applies to substantial changes in ownership or control. Only transfers of ownership substantial enough to give rise to a real risk of profiteering through short term resale are addressed by Section 13. Thus, only that subset of the precedent under Section 309(c)(2)(B) dealing with transfers of ownership, as distinguished from control, is relevant to interpretation of the antitrafficking restriction in Section 13. Applied here, those precedents would require -- as TCI advocated in its initial comments in this proceeding⁴ -- that only transfers of 50 percent

⁴ Comments of TCI at 47-48.

or more of the equity interest in a cable system would be subject to the three-year holding period of Section 13.

Cole, Raywid & Braverman note correctly that Section 13 is expressly limited to transfers of ownership engaged in by persons meeting the Cable Act's definition of a "cable operator".⁵ The effect of that limitation is to require that only transactions involving the sale or transfer of ownership of a cable system by a "cable operator" are subject to the three year holding period.⁶

B. The Commission Must Retain Exclusive Jurisdiction to Interpret and Enforce the Antitrafficking Restrictions

The comments from the National Association of Telecommunications Officers and Advisors, et al. ("NATOA"), contain a series of internally inconsistent positions. To the extent that these comments reflect the views of the local franchising authorities that NATOA has appointed itself to represent, they illustrate graphically why the Commission cannot rely on local franchising authorities to interpret or enforce the

⁵ Comments of Cole, Raywid & Braverman at 3.

⁶ Cole, Raywid & Braverman suggest, id. at 6, that the strict 50 percent or more of equity standard advocated by TCI and others (e.g., Comments of Time Warner Entertainment Company, L.P.) might subject transactions by persons not within the statutory definition of "cable operator" to the antitrafficking rule. That problem arises only if one fails to give effect to both crucial statutory terms in Section 13(a): "cable operator" and "transfer of ownership". If the Section 13 restrictions are properly applied only to substantial transfers of ownership engaged in by cable operators, the difficulty suggested by Cole, Raywid & Braverman disappears.

antitrafficking rules. Such reliance would be equivalent to appointing the prosecutor as judge and jury. Not surprisingly, NATOA takes the position that the Commission should not be involved at all in the process.⁷

NATOA properly concedes that the antitrafficking prohibition is addressed to "profiteering transactions," that is, "acquiring and selling franchises for profit without building or operating the system over the long term," the harm from which arises primarily because of "substantial debt and other expenses in connection with a transfer of control."⁸ NATOA then proceeds to argue that cable operators (and, a fortiori, their customers) should be saddled with the expense of unlimited regulatory harassment by local franchise authorities in order to transfer a system.⁹ Even more inconsistently, NATOA argues that Section 13 applies to transfers of as little as five percent of the stock of a cable system and to changes in de facto control of a system.¹⁰ Of course, neither a five percent ownership change nor a change in de facto control has anything to do with "selling franchises for profit," the evil to which NATOA says the statute is directed.

⁷ NATOA Comments at 11.

⁸ Id. at 4.

⁹ Id. at 5-8, 10-13, and 14-18.

¹⁰ Id. at 10-11.

C. All Transactions Not Subject to Current Federal Income Tax Liability (in Whole or in Part) Should Be Exempt Under Section 13(c)(1)

The comments confirm TCI's initial concern that any effort to catalog the particular types of transactions subject to the tax-free transaction exception in Section 13(c)(1) would be futile and counterproductive.¹¹ While the comments of Cablevision Industries Corporation and Comcast Corporation,¹² Corporate Partners,¹³ and Sandler Capital Management¹⁴ each catalog types of non-recognition transactions that are unquestionably included within the ambit of Section 13(c)(1), the fluidity of the Internal Revenue Code and IRS regulations require that the Commission provide generally that all non-recognition transactions that fall under current or future statutes or regulations are exempt under Section 13(c)(1).

The focus in the comments on cataloging and debating the full range of non-recognition transactions leads to uniform omission of an obvious point: Section 13(c)(1), by its terms, exempts from the three year holding period any sale on which the seller does not incur taxable gain. Thus, for example, the section does not apply to a sale in which the seller sells a cable system for an amount less than or equal to what he or she

¹¹ TCI Comments at 52.

¹² Joint Comments of Cablevision Industries Corporation and Comcast Corporation at 12-15.

¹³ Comments of Corporate Partners at 13-16.

¹⁴ Comments of Sandler Capital Management at 12-15.

paid for it. Given that the evil to which the antitrafficking provision is directed is the short term resale for profit by a profiteer, a resale devoid of profit falls entirely outside the scope of the prohibition.

Therefore, the rules implementing the tax-free transfer exception should simply recite that all transactions that enjoy a complete or partial deferral of tax liability, specifically including but not limited to the particular transactions cataloged in the comments of Cablevision Industries Corporation and Comcast Corporation (at 12-15), Corporate Partners (at 13-16), and Sandler Capital Management (at 12-15), and all transactions that entail no taxable gain to the seller, are exempt from the three-year holding period of Section 13.

II. CONCLUSION

For the foregoing reasons, TCI respectfully recommends that the Commission adopt rules to implement Section 13 of the Act consistent with the comments contained herein and in its initial comments in this proceeding.

Respectfully submitted,
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